

Supreme Court, U. S.

FILED

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IN THE
Supreme Court of the United States MAHAK, JR., CLERK

OCTOBER TERM, 1976

No. 76-1004

CASTLEWOOD INTERNATIONAL CORPORATION,
Petitioner,

v.

DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT

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February 22, 1977

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DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC.,
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BRIEF FOR RESPONDENT

Respondent Distilled Spirits Council of the United States, Inc. (DISCUS) respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit be denied. In unanimously affirming the District Court's decision in favor of DISCUS, the Court of Appeals established no new legal precedent and decided no factual questions. Accordingly, there is no basis for Petitioner's request for review by this Court of an appellate affirmance of a grant of summary judgment based on uncontested facts.

OPINIONS BELOW

Inexplicably, Petitioner Castlewood has failed to comply with Rule 23(i) of this Court requiring that the opinions delivered by the courts below be appended to the Petition (Sup.Ct.R. 23(i)). The Petition does not contain the *per curiam* opinion of the Court of Appeals affirming the dismissal of Castlewood's complaint.¹

We attach hereto as Appendix A the decision below of the United States Court of Appeals for the District of Columbia Circuit in this case (Civ. No. 76-1016), unanimously affirming the District Court's grant of summary judgment in favor of DISCUS. We attach hereto as Appendix B the Order and Judgment of the District Court in this case (Civ. No. 76-540).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition (Pet. 2).

QUESTION PRESENTED

Whether this Court should review a unanimous decision of the Court of Appeals which applied well-settled legal principles in affirming an order granting summary judgment on the basis of undisputed material facts.

¹ Appendix A to the Petition contains a decision of the United States Court of Appeals for the District of Columbia Circuit in a related case, *Castlewood International Corporation v. George P. Schultz, Secretary of the Treasury* (Civ. No. 74-560), which was decided on June 16, 1975. In addition, Appendix C to the Petition is a Memorandum and Order by United States District Judge Gerhard Gesell, also in *Castlewood International Corporation v. George P. Schultz, Secretary of the Treasury* (Civ. No. 74-560), decided on July 17, 1974. Respondent DISCUS was not a party to these proceedings.

STATUTORY PROVISIONS INVOLVED

The applicable statutory provisions are set forth in Appendix C.

COUNTERSTATEMENT OF THE CASE

A. Nature of the Case

DISCUS was served with the complaint in this action on May 6, 1974, which named as a co-defendant the National Association of Alcoholic Beverage Importers, Inc.¹ The two-count complaint² sought damages for alleged violations of the Sherman Act, 15 U.S.C. § 1, *et seq.*, charging in Count I that the two defendants engaged in acts constituting a "group boycott", and in Count II a common law action for interference "with the advantageous business relationship existing between plaintiff and the participants and potential participants in plaintiff's [wine] exposition" (R-1).³

¹ On May 25, 1976, Castlewood filed a stipulation voluntarily dismissing defendant National Association of Alcoholic Beverage Importers, Inc. from this case.

² This is not the only federal court action Castlewood instituted in connection with the matters raised by its complaint. On April 9, 1974, Castlewood filed an action in the United States District Court for the District of Columbia against George P. Schultz, Secretary of the Treasury, challenging the validity of an advisory opinion rendered by the Bureau of Alcohol, Tobacco and Firearms to the effect that any wholesaler, manufacturer, or distributor participating in Castlewood's wine tasting exhibition would be placing his permit to do business in jeopardy. On July 17, 1974, the complaint was dismissed on motion by the defendant. Thereafter, an appeal was taken by Castlewood to the United States Court of Appeals for the District of Columbia. On June 16, 1975, the Court of Appeals affirmed the judgment of the District Court dismissing Castlewood's complaint for failure to state a claim. Castlewood did not file a petition for writ of certiorari from that decision. *See, Castlewood Int'l Corp. v. Schultz*, Civil Action No. 74-560 (D.D.C. 1974), *affirmed*, 515 F.2d 1017 (D.C. Cir. 1975).

³ "R" refers to the record before the Court of Appeals.

On or about July, 1973, Petitioner Castlewood, a liquor retailer with numerous package stores and cocktail lounges in Florida and other states, began planning a public wine and cheese tasting exposition to be held at the Convention Hall in Miami Beach, Florida (R-15). As part of its preparations, Castlewood requested the Bureau of Alcohol, Tobacco and Firearms of the United States Department of the Treasury (hereinafter BATF), to advise it whether its proposal to solicit contributions from suppliers for the purpose of financing the wine exposition violated any law or regulation governing the alcoholic beverage industry (R-27). BATF responded with a written opinion stating that Castlewood's proposal to solicit contributions "would likely" violate the Federal Alcohol Administration Act, 27 U.S.C. § 205 (b) (1935), and added that any supplier of alcoholic beverages who contributed to the wine exposition would be placing its federal liquor permit to do business in jeopardy (R-27).

Castlewood then sought to have BATF change its advisory opinion, but in January, 1974, BATF reaffirmed in writing its prior advisory opinion, warning that it intended to "monitor the exposition and subsequent events to determine whether violations occur" (R-38). Specifically, BATF stated in its second opinion letter:

Any wholesaler, manufacturer, or distributor participating in your exposition should be on notice that if the events that actually occur result in the proscribed elements of inducement and exclusion under 27 U.S.C.A. § 205, appropriate action will be taken (R-27).

DISCUS, a trade association of alcoholic beverage suppliers, publicized the BATF opinions in a memorandum to its membership. The memorandum also noted that contributing anything of value in furtherance of that exposition would be in conflict with a provision of the

DISCUS Code of Good Practice. Finally, the memorandum stated that DISCUS did not intend to interfere with the commercial relationships of its members, and that the information contained in the memorandum was merely being offered to assist them in evaluating whether to contribute financially to the wine and cheese tasting exposition (R-27).

The allegations of Castlewood's complaint cannot mask the fact that this action, at best, stems from a dispute between Castlewood and BATF. The complaint seeks to blame DISCUS for alleged consequences resulting from the advisory opinions of BATF, with which Castlewood now takes issue, although it voluntarily sought the opinions from the government. As DISCUS demonstrated in support of its motion for summary judgment, the BATF opinions, the deposition testimony of Castlewood's officers, and Castlewood's own corporate records establish that Castlewood decided in the end to conduct its wine exposition on its own, because of the written advice given by BATF in ruling that any supplier making contributions to the exposition would place in jeopardy its basic federal liquor permit to do business, and not because of any alleged "group boycott" (R-27). Castlewood did not controvert these facts and merely contended that on the basis of the allegations of its complaint summary judgment should not be granted (R-30).

B. Proceedings Below

On November 3, 1975, the District Court (Bryant, J.), on the basis of the undisputed facts and settled law, issued an Order and Judgment granting summary judgment and dismissing the complaint (App. B).

On review, the Court of Appeals unanimously affirmed the Order and Judgment of the District Court (Before: Bazelon, Chief Judge, Tamm and Robb, Circuit Judges) (App. A). In its *per curiam* opinion, the Court stated:

The appellant set forth no facts showing there was a genuine issue for trial. Fed.R.Civ.P. 56(e); *Dewey v. Clark*, 86 U.S.App.D.C. 143, 180 F.2d 766 (1950); *Thompson v. Evening Star Newspaper Company*, 129 U.S.App.D.C. 299, 394 F.2d 774, cert. denied, 393 U.S. 884 (1968); *First National Bank v. Cities Service Company*, 391 U.S. 253, 289-90 (1968). The cost of the depositions used in support of the motion for summary judgment and the cost of copies of papers obtained for use in the case were properly taxed to the appellant. (App. A).

REASONS FOR DENYING THE WRIT

A. The Record Reveals No Genuine Dispute of Material Facts to Be Tried

Both courts below properly concluded that DISCUS' moving papers for summary judgment had demonstrated that there was no genuine issue of material fact to be tried in this case. Specifically, the undisputed facts showed that Castlewood abandoned its efforts to obtain financial assistance from suppliers and decided to conduct the wine exposition on its own, because of the opinions rendered by BATF of the Treasury Department, rather than because of any group boycott by DISCUS. These facts were established by Castlewood's own company records, the testimony given in depositions by its two principal officers, as well as the BATF opinions.¹

¹ During the course of depositions, Castlewood's Vice President, who was in charge of the wine exposition, admitted that Castlewood decided to run the wine exposition itself and not to sell booth space to suppliers "because of the letter from the Government [BATF] as far as the wholesalers were concerned. We [Castlewood] thought we would be better off just running it ourself and not having any problems" (R-26). He further testified that Castlewood abandoned its effort to get financial participation from suppliers "because of the letter that was sent out by the Government [BATF]" (R-26). He also pointed out in his testimony that the suppliers "said they did not want to come into the wine show be-

There were no facts to support any allegation of a group boycott. Given these uncontested facts, the District Court had no alternative but to grant summary judgment and dismiss the complaint.

Nowhere in the Petition, nor in its arguments below, has Petitioner Castlewood challenged or disputed the material facts upon which the motion for summary judgment was based. Indeed, Castlewood, in its opposition papers below, filed only a single affidavit, prepared and signed by its attorney, who is also a member of Castlewood's board of directors. The affidavit merely consisted of a restatement by counsel of the allegations of the complaint, without giving any factual support for them. Significantly, the affidavit conceded that Castlewood "does not differ with defendant DISCUS as to its statement of material facts" (R-30). In view of this admission, the District Court quite properly granted summary judgment and the Court of Appeals with equal appropriateness affirmed that decision.

In its Petition to this Court, Castlewood merely reasserts the oft-stated antitrust rule that certain concerted refusals to deal or group boycotts are *per se* violations of the antitrust law (Pet. at 10, 11, 12 and 13). In place of specific facts to support these conclusory allegations, Castlewood offers only the conclusions of law and statements of ultimate facts set forth in its complaint. The cases on summary judgment under Rule 56, however, uniformly hold that such conclusory assertions are not sufficient to defeat a motion for summary judgment. See *First National Bank v. Cities Service Co.*, 391 U.S. 253, 289-290 (1948); *Dewey v. Clark*, 180 F.2d 766 (D.C. Cir. 1950); *Thompson v. Evening Star News-*

cause of the exposure they may have with the Government [BATF]" (R-26). For further statements to the same effect, see also R-15 and 27).

paper Co., 394 F.2d 774 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 884 (1968).

B. The Decision Below Was Correct and Presents No Important Question of Federal Law

Petitioner Castlewood's main argument is that both the District Court and the Court of Appeals misapplied the summary judgment procedures under Rule 56 of the Federal Rules of Civil Procedure by purportedly ignoring this Court's statement in *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962), to the effect that "summary procedures should be used sparingly in complex antitrust litigation when motive and intent play leading roles . . ." (*id.* at 473; Pet. 8).

This argument is defective in at least three respects. First, this case is neither complex antitrust litigation nor one involving issues turning on motive or intent. The only issue presented by the complaint is the reason why Castlewood abandoned its efforts to obtain financial contributions for its wine exposition from liquor suppliers, an issue that involves neither motive nor intent. As shown above, the undisputed record facts, admitted by Castlewood, show that it conducted the wine exposition on its own solely because of the opinion letters received from BATF, warning that such participation would jeopardize the liquor permits of the suppliers.

Second, contrary to Castlewood's contention in the Petition, there is no rule that summary judgment procedures do not apply to antitrust cases (Pet. 8). Indeed, Rule 56 has been applied many times to antitrust cases, including by this Court as early as 1947. *See, International Salt Co. v. United States*, 332 U.S. 392 (1947).

Third, this Court has held that the policy of sparing use of summary procedures in complex antitrust cases is no warrant for every plaintiff who can draft an antitrust

complaint, no matter how groundless or improbable its allegations, to force its claim to trial despite its deficient factual basis. In *First National Bank v. Cities Service Company*, 391 U.S. 253 (1968), this Court said:

What Rule 56(e) does make clear is that a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him.

* * * *

To the extent that Petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaint, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. (*Id.* at 289-90.)

Throughout the Petition, Castlewood ignores this basic principle that summary judgment may not be defeated by mere conclusory allegations based on ultimate facts contained in a complaint. Since the Petition fails to show that the courts below relied on any disputed facts or misapplied the standards of Rule 56, there is no basis for challenging in this Court the order of the District Court granting summary judgment or the decision of the Court of Appeals affirming the dismissal of the complaint. In any event, this case does not involve an important question of federal law calling for settlement by this Court or a direct conflict in opinions of United States Courts of Appeals. Accordingly, there is simply no basis for further review of this case by this Court.

CONCLUSION

For these reasons, we submit the petition should be denied.

Respectfully submitted,

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February 22, 1977

APPENDICES

A-1

APPENDIX A

Opinion of the Court of Appeals
Dated October 22, 1976

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

Civil 74-641

[Filed October 22, 1976]

No. 76-1016

CASTLEWOOD INTERNATIONAL CORPORATION,
a Florida Corporation,
v. *Appellant*

DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC.,
a New York Corporation, ET AL.

No. 76-1190

CASTLEWOOD INTERNATIONAL CORPORATION,
a Florida Corporation,
v. *Appellant*

DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC.,
a New York Corporation, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: BAZELON, Chief Judge, TAMM and ROBB,
Circuit Judges

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JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from in these causes are hereby affirmed.

The appellant set forth no facts showing there was a genuine issue for trial. FED. R. Civ. P. 56(e); *Dewey v. Clark*, 86 U.S. App. D.C. 143, 180 F.2d 766 (1950); *Thompson v. Evening Star Newspaper Co.*, 129 U.S. App. D.C. 299, 394 F.2d 774, *cert. denied*, 393 U.S. 884 (1968); *First National Bank v. Cities Service Co.*, 391 U.S. 253, 289-90 (1968). The cost of the depositions used in support of the motion for summary judgment and the cost of copies of papers obtained for use in the case were properly taxed to the appellant.

Per Curiam

For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

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APPENDIX B

*Order and Judgement of the District Court
Dated November 3, 1975*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-641

[Filed Nov. 4, 1975]

CASTLEWOOD INTERNATIONAL CORPORATION,
v. *Plaintiff,*

DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC.
and

NATIONAL ASSOCIATION OF ALCOHOLIC BEVERAGE
IMPORTERS, INC. *Defendants.*

ORDER

Upon consideration of defendant Distilled Spirits Council of the United States, Inc.'s Motion to Dismiss or in the Alternative for Summary Judgment, with a Memorandum of Points and Authorities in Support of such Motion, and plaintiff's opposition to such Motion.

IT IS HEREBY ORDERED that Summary Judgment be, and hereby is, granted for the defendant Distilled Spirits Council of the United States, Inc.

Dated this 3rd day of November, 1975.

/s/ William B. Bryant
United States District Judge

APPENDIX C

Statutory Provisions Involved

1. Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 1, provides in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *.

2. Section 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 2, provides in pertinent part:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *.

Federal Rules of Civil Procedure

1. Rule 56(e), FED. R. CIV. P., provides in pertinent part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.